CIGUATERA POISONING: CURRENT ISSUES IN LAW

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The current situation with regard to liability under Queensland law relevant to ciguatera poisoning is reviewed. It is argued that all sectors of the fishing industry should be acquainted with their responsibilities under common law and under the statutes of Workplace Health & Safety Act, Trade Practices Act, and Sale of Goods Act to prevent litigation in the event of an incident.

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Areas of Queensland law relevant to ciguatera poisoning are (i) Liability pursuant to Common Law and (ii) Statutes (Workplace Health & Safety Act, Trade Practices Act, Sale of Goods Act).

LIABILITY AT COMMON LAW

Liability at common law can be based on breach of contract, Tort or Statute. Breach of Statute will be dealt with below. Breach of contract, usually in the form of breaching implied duties of care, gives rise, to the extent that privity of contract allows, to similar duties to that which arise in tort liability. Tort, or civil wrong, is based on a concept of a duty of care. For an action to lie in tort, three elements are required to be proven: 1) damage, 2) a relationship of proximity, and 3) want of reasonable care, in circumstances of foreseeable risk.

The starting point is the case of *Donaghue* v. *Stevens*[1], which involved purchase by Donaghue of a bottle of ginger beer, in circumstances where, due to the bottle being opaque, the contents of the bottle could not be seen. The bottle in fact contained the remains of a decomposed snail which fact was not ascertained by Ms Donaghue until after she had consumed the contents of the bottle. She was not the original purchaser of the bottle, which had been bought by a friend and arguably no contractual relationship existed as between her and the maker. In the leading decision Lord Atkin held

'*you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour - who, then, in law is my neighbour. The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*'

In applying this principle to ciguatera poisoning, the first element to consider is the question of proximity or to whom is the duty owed. Based on the 'neighbour' principle of Lord Atkin, it would be any person whom the provider of fish ought reasonably have in contemplation as likely to be affected. This would include the eventual consumer, whether or not that person be the purchaser of the fish. The relationship vis-a-vis the consumer would be: commercial catcher, marketer, vendor (fresh), and provider (prepared). Each of these (individual or corporate) would owe a duty of care to the consumer of the fish.

The duty is to protect from foreseeable risk of harm. To determine whether or not that duty has been breached, consider:(i) whether there was a foreseeable risk of injury; (ii) whether the foreseeable risk gave rise to the injury - causation; (iii) whether the foreseeable risk could be prevented; and (iv) whether the foreseeable risk should, in all the circumstances, be reasonably prevented.

The standard by which the test of breach is measured is that of the reasonably prudent person[2], which in respect of ciguatera would be 'the reasonably prudent commercial catcher, marketer, vendor or provider'.

Whether a risk of injury is, or is not, foreseeable, depends on the circumstances of an incident. In the Wagon Mound No. 2[3], it was held '*....a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows and ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man.*'

In respect of causation, it must be the foreseeable risk which gives rise to the injury. This does not mean that the 'precise' injury must be

foreseen but rather the general nature or category of the injury, i.e. strain, break, poisoning[4].

The case of *McLean* v. *Tedman*[5] deals with the issue of prevention. That case dealt with the system of work adopted by garbage collectors and provided that once the collector had raised an alternative system of work (which could have been adopted and so avoided risk of injury), that it was up to the employer to establish that such system would not work in the circumstances of the case.

Finally, the Court will need to decide whether or not, in all the circumstances of a matter and where the three elements of forseeability, causation and prevention have been made out, as to whether or not there has been a failure to provide reasonable care. In reaching its conclusion the Court will, inter alia, consider matters such as: seriousness of the risk, i.e. its potential to harm; effect on the person upon whom the duty is cast, i.e. whether or not it will unwarrantedly impede the process of industry; and cost of implementation or effect of implementation or alternatives[6].

Further, in reaching its decision and considering the elements of breach, the Court will have regard to practical matters such as: prior complaint, state of general knowledge and/or specialised knowledge on the issue of risk, what steps have been taken to investigate and eliminate risk, whether risk of a similar nature or magnitude has been removed or otherwise dealt with, whether or not subsequent to injury an alteration has been made, and custom and practice within the industry.

From the layman's perspective of ciguatera, the following elements are discernible: species of fish, location of breeding ground, range of symptoms - from mild to serious, prohibition on species/breeding ground, incubation period for onset of symptoms, sensitisation to the ciguatera toxin, increased toxicity in respect of certain parts of the fish, size of fish, treatment, inability to detect.

These factors need to be considered in the light of an individual experience to determine whether or not liability will be incurred. For example, if a commercial catcher of fish sold Red Bass, caught anywhere in Queensland, or narrow barred Spanish mackerel, caught off Platypus Bay, then there is no doubt he would be liable in Tort to any person who consumed the fish and became symptomatic. Equally, it may be the case that any provider of prepared fish who provided as part of a seafood restaurant menu, barracuda liver taken only from large barracuda, would be liable. This case would, of course, be dependent on the state of knowledge. However, it should be remembered that it is not the individual's state of knowledge that is relevant, but rather the state of knowledge of the reasonably prudent provider etc. It is arguable that a seafood provider in Queensland should be aware of the existence of ciguatera poisoning and its likely causation. This is especially so given the regular press coverage given to the subject and the existence of appropriate Departmental information.

At the other end of the scale, it is probably not arguable that liability would accrue to a provider who sold barramundi which in turn lead to symptoms of ciguatera poisoning. This is particularly so, noting the low incidence of ciguatera poisoning linked to the species where only one case is ascribed during the period 1965–1984[7].

Somewhere between these extremes will, of course, be the grey area of concern to the industry. For example, the selling of narrow barred Spanish mackerel which has been linked with 226 cases in Queensland between 1965–1984[8]. This is of more concern when Gillespie, Lewis et al. (1986) statements are considered: '*a large number of cases of ciguatera are not reported to health authorities, so the true incidence of ciguatera is difficult to assess*' and '*Whether these figures reflect a trend towards an increasing incidence of ciguatera or increased public awareness is not known, but it is certain that the abovementioned Reports represent only a proportion of the outbreaks that have occurred*'.

Therefore given what appears to be a relatively high incidence of ciguatera cases/outbreaks associated with narrow barred Spanish mackerel, given the potential of ciguatera poisoning to cause severe health problems and given that species such as Red Bass which are known to cause risk in other Pacific countries (but which have been involved in few reported cases locally)[10] are prohibited, then it is arguable that if the consumption of commercially caught narrow barred Spanish mackerel gave rise to ciguatera poisoning, that liability would accrue. This may not be that clear as, for example, it may be the case that a professional fisherman could argue that narrow barred Spanish mackerel were only of concern if caught, for example, off Fraser Island. This is a matter which depends on its own facts and will be clarified as research continues.

There may well be arguments as to why it is not reasonable to remove narrow barred Spanish mackerel from the catch in areas other than the zones of concern, i.e. Cairns/Townsville, Rock-

hampton and Fraser, or to remove certain sizes of catch. Such arguments are plausible, but it is emphasised are dependent on the relevant facts and level of knowledge.

In summary, to assess whether or not liability accrues in any given circumstance, it is necessary to: (i) show that a relationship of proximity exists, (ii) show that there is a failure or want of reasonable care, by demonstrating that there was a foreseeable risk of injury, which gave rise to the type of damage which was foreseen, which could reasonably have been prevented, and (iii) the consideration of whether or not such breach has occurred will be dependent on the facts and circumstances of the poisoning and the events that precede it.

The author considers it inevitable that there will be successful litigation in respect of ciguatera poisoning. It is simply a matter of time.

WORKPLACE HEALTH & SAFETY ACT – DUTIES OF CARE

The most important changes to Occupational Health & Safety in Australia, are the introduction of Robens-style legislation. Robens' legislation is based on the self regulation of Occupational Health and Safety in workplaces as opposed to regulation by way of sanction imposed from outside the workplace.

The Queensland Workplace Health and Safety Act, which is the embodiment of the Robens model, was assented to on 12th May, 1989, with Section 6, 36 and 57 commencing on 10th June, 1989 and the remaining provisions commencing on 31st July, 1989[11]. Regulations were enacted and commenced on 31st July, 1989, excepting regulations dealing with diving, which commenced on 30th October, 1989[12]. This Act amended, or repealed the Construction Safety Act, the Inspection of Machinery Act, the Health Act and the Shops and Factories Act. It is now the Act dealing with Occupational Health & Safety for the great majority of Queensland workers.

Since enactment there have been substantial amendments to both the Act and the Regulations. The most significant amendment being the inclusion of the rural industry within the parameters of the Act by amendment in 1990.

Central to the Robens' model are: duties of care, internal workplace assessment, and broad based prescriptive alternatives, i.e. codes of practice[13].

The duty of care is expressed as a legislative formula in the Act: '*an employer who fails to ensure the health and safety at work of all the employers, employees, save where it is not practicable for the employer to do so, commits an offence against this Act.*'[14].

With the definition of practicable in the Act being, *practicable, means practicable having regard to:-*

(a) the nature of the employment or, as the case may be, the particular aspect of the employment concerned; and

(b) the severity of any potential injury or harm to health or safety that may be involved, and the degree of risk that exists in relation to such potential injury or harm; and

(c) the state of knowledge about the injury or harm to health or safety that may be involved, about the risk of that injury or harm to health or safety occurring and about any ways of preventing, removing or mitigating that injury, harm or risk; and

(d) the availability and suitability of ways to prevent, remove or mitigate that injury or harm to health or safety or risk; and

(e) whether the cost of preventing, removing or mitigating that injury or harm to health or safety or that risk is prohibitive in the circumstances.[15].

This duty reflects broadly the common law principle of the duty of care which has evolved through personal injuries case law and was enunciated by Lord Atkin in the case of *Donaghue* v. *Stevens*.

Section 9 provides for the duty of care and imposes the relationship in respect of employers and employees. The Act, however, does not solely relate to workplace health and safety, but extends well beyond what is perceived to be the employment relationship. This is the result of the origins of the Workplace Health & Safety Act[16].

Of particular relevance to the commercial fishing industry is Section 10 of the Workplace Health & Safety Act: '*(1) An employer who fails to conduct his or her undertaking in such a manner as to ensure that his or her own health and safety and the health and safety of persons not in the employer's employment and members of the public who may be affected are not exposed to risks arising from the conduct of the employer's undertaking, except where it is not practicable for the employer to do so, commits an offence against this Act.*'

It is clear that this would include commercial catcher, marketers, vendors (fresh), and the provider (prepared).

The definition of practicability applies to Section 10 and the terms of the definition should be

considered. Basically, practicability provides for a similar test as is used for breach of duty of care under tort. The principal difference is that there is no requirement for causation. That is, no injury needs to occur for there to be a breach of the Workplace Health & Safety Act. That means that if a risk exists which could be reasonably removed and ought to be reasonably removed and is not so removed, then an offence occurs.

Matters discussed above in respect of the breach of duty of care under tort, i.e. forseeability, preventability and reasonableness are equally applicable to a consideration of practicability. There are however, in the writer's view, some essential differences between the duty owed pursuant to tort and the duty under the Workplace Health and Safety Act. These duties arise from the fact that the Workplace Health and Safety Act is a quasi criminal act[17], which means its provisions must be strictly construed to the benefit of the individual against whom the sanction is imposed. This is of particular relevance to the last element of practicability which, as noted above, is: '*(e) Whether the cost of preventing, removing or mitigating that injury or harm to health or safety of that risk is prohibitive in the circumstances.*

This on a strict construction should be considered in the light of the abilities of the individual commercial catcher, marketer, vendor and provider to meet that cost. In other words, rather than an application of the test of the reasonable person, the individual should be considered.

Nonetheless, given the industry's knowledge of ciguatera poisoning and potential risk of harm to members of the public the Act may well have been breached.

Breach of the Workplace Health & Safety Act will also support an action at common law for damages. Further, the penalties range from a fine of $3,000 or 6 months imprisonment for a person (other than a body corporate) where the Act is contravened to a fine of $30,000 or 6 months imprisonment where a death or serious bodily injury occurs (again this is for a person other than a body corporate). Offences for bodies corporate range from $12,000 to $120,000[18]. By Section 124 of the Act, a person who is a managing director or other governing officer or who at any time acts or takes part in the management, administration or government of the business in Queensland of a body corporate can be liable to punishment by imprisonment.

In my view the industry must comply with provisions of the Workplace Health & Safety Act and should consider its position vis-a-vis whether or not it is practicable for the risk to be removed.

TRADE PRACTICES ACT & SALE OF GOODS ACT

When a consumer purchases an item from a retailer there is an oral contract and into this oral contract certain terms are implied by law. These implied terms are measured in law to balance the relationship between retailer and consumer to protect the consumer from the 'caveat emptor' (i.e. buyer beware) principle.

The implied terms of the contract are either conditions or warranties. Basically, a condition is a vital or fundamental term whereas a warranty is a collateral or subsidiary term.

Where there is a breach of a condition the consumer can return the goods, get a refund and sue for compensation for any loss suffered as a consequence of the breach. Where there is a breach of warranty on the other hand the consumer cannot return the goods and get a refund, but the consumer can sue for compensation for any loss suffered as a consequence of the breach.

Therefore, if a retailer breaches a condition or a warranty, he/she is exposing himself/herself to an action by the consumer for compensation for any loss suffered as a consequence of the breach.

Certain conditions and warranties are implied by the Commonwealth's Trade Practices Act and the States' Sale of Goods Act. Most significant in the current context is the implied condition that the goods be of merchantable quality.

Under Section 66(2) of the Trade Practices Act, goods are of merchantable quality '*...if they are fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect, having regard to any description applied to them, the price (if relevant) in all other circumstances.*' A similar definition is provided by s17(2) of the Queensland Sale of Goods Act.

Basically, to be of merchantable quality the goods must:-(a) pass without objection in the trade and description given to them in the contract, and

(b) be of fair and average quality within the description, and

(c) be fit for the usual purpose for which such goods are used, and

(d) one with variations allowed by the agreement of even kind, quality or quantity within each unit and among all units, and

(e) be adequately contained, packaged and labelled, and

(f) conform to the promises or affirmations of fact made on the label or container.

The implicd condition or merchantable quality does not apply where the defects are brought to the consumer's attention prior to sale or where reasonable examination of the product occurs and the defects ought to have been revealed by this examination. This situation is of course unlikely to occur in relation to ciguatera affected fish.

It could be argued that where ciguatera affected fish is sold it may not be of merchantable quality as it would not be of fair and average quality within the description and would not be fit for its usual purpose, i.e. human consumption. A person would then arguably sue for the damagc that has been suffered.

Where the goods are not of merchantable quality, the retailer may be exposing him/herself to a suit by the consumer for compensation for loss suffered as a consequence of such breach. These rights of redress are of course only available to the purchasers of the affcctcd fish.

CONCLUSION

It is arguable that action could be taken against industry members in relation to ciguatera poisoning, either by suit under common law, by prosecution under the Workplace Health & Safety Act, or action pursuant to the Trade Practices or Sale of Goods Act. I suggest the industry should be pro-active and consider what steps can be taken to address potential liability.

LITERATURE CITED

1.[1932] AppealCase 562

2.*Glasgow Corporation* v. *Muir* [1943] 1 AC 447.

3.[1967] AC 617.

4.See gencrally *Hamilton* v. *Nuroof* (1956) 56 Commonwealth Law Reports 18.

5.[1984] 155 CLR 306.

6.See generally *General Cleaning Contractors* v. *Christmas* [1953] AC 180, *Read* v. *J. Lyons & Co Limited* [1947] AC 156.

7.Table 3, Ciguatera in Australia, Vol. 145 *Medical Journal of Australia*, December, 1986, p. 584, Gillespie, Lewis et al.

8.*ibid.*

9.*ibid*, p. 586.

10.*ibid*, p. 587.

11.Ss 1 & 2 commenced on the day of Assent.

12.Regulations 1 & 2 commenced on 29th July, 1989.

13.Scc Scction 34 of the Workplace Hcalth & Safety Act.

14.See Section 9 of the Workplace Health & Safety Act.

15.See Section 6 of the Workplacc Health & Safcty Act.

16.The Queensland Workplace Health and Safety Act, M. Quinlan, T. Farr, J. Payne, *Journal of Occupational Health & Safety* - Australia, New Zealand, 1989, 5(3), p. 265 - 274.

17.Scc Section 118, 119 and 124.

18.See Section 118 & 119 and for definition of serious bodily injury see Section 6.